IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 05-CV-329-GKF(PJC)**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S MOTION IN LIMINE PERTAINING TO OTHER CONTRIBUTORS OF PHOSPHORUS AND BACTERIA TO THE IRW

COMES NOW the Plaintiff, the State of Oklahoma, ex rel. W.A. Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, J.D. Strong, in his capacity as the Trustee for Natural Resources for the State of Oklahoma ("State"), and respectfully moves this Court to enter an order, pursuant to Federal Rules of Evidence 401 and 402, precluding Defendants, Defendants' witnesses and Defendants' counsel from directly or indirectly mentioning, inquiring about, introducing, arguing, or otherwise referencing any other contributions or contributors of phosphorus and bacteria to the IRW for the purpose of implying or arguing that any or all Defendants are not jointly and severally liable for damages, response costs, and/or injunctive relief. In this regard, it is irrelevant to the imposition of joint and several liability because Defendants cannot prove divisibility of harm.

I. INTRODUCTION

Defendants have repeatedly suggested that evidence of other contributors/contributions of phosphorus and bacteria to the IRW should somehow limit their liability in this case. For example, in Defendants' Reply in Support of Motion for Partial Summary Judgment Dismissing Counts 1, 2, 3, 4, 5, 6 and 10 Due to Lack of Defendant-Specific Causation and Dismissing Claims of Joint and

Several Liability Under Counts 4, 6, and 10 (Dkt. #2259), Defendants argued that "there are myriad other sources of nutrients and bacteria in the watershed, so when bacteria and nutrients are found in a stream, there is no inherent evidence that those nutrients or bacteria came from poultry litter and not humans, cattle, wildlife, or other sources." (*Id.* at 5.) Defendants have also designated countless excerpts from deposition transcripts relating to other potential sources of phosphorus and bacteria to the IRW. Such excerpts contain lengthy discussion about, by way of example only, the dam failure at Lake Frances in 1990 (*e.g.*, 8/29/08 D. Smithee Dep.), the application of nutrients by nurseries in the IRW (*e.g.*, 8/7/08 S. Dickinson Dep.), and septic problems at the state parks in the IRW (*e.g.*, 3/12/09 K. Marek Dep.).

The State's claims, if and when proved, impose joint and several liability. Evidence of other contributors to a harm is an irrelevant consideration to the defense of joint and several liability where, as is the case here, Defendants cannot show divisibility of harm, as more fully discussed below. Accordingly, any such evidence presented, or inquired into, by Defendants should be precluded under Federal Rules of Evidence 401 and 402 for the purpose of implying or arguing that any or all Defendants are not jointly and severally liable for damages, response costs, and/or injunctive relief.

II. LEGAL STANDARD

"Evidence which is not relevant is not admissible." Fed. R. Evid. 402. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. "Though the standard for relevance under Federal Rule of Evidence 401 is quite generous, *see United States v. Jordan*, 485 F.3d 1214, 1218 (10th Cir. 2007), proffered evidence must, at minimum, advance the inquiry of some consequential

fact to be considered relevant and admissible. *See* 7 Kenneth S. Broun, *McCormick on Evidence* § 185 (6th ed. 2006)." *United States v. Oldbear*, 568 F.3d 814, 820 (10th Cir. 2009).

III. ARGUMENT

Pursuant to Federal Rule of Evidence 401 and 402, Defendants should be precluded from directly or indirectly mentioning, inquiring about, introducing, arguing, or otherwise referencing evidence of other contributors/contributions of phosphorus and bacteria to the IRW for the purpose of implying or arguing that any or all Defendants are not jointly and severally liable for damages, response costs, and/or injunctive relief.

A. As To the Defense of the State's CERCLA Claims, Evidence of Other Contributors of Phosphorus to the IRW Should Be Precluded for the Purpose of Arguing or Implying That Joint and Several Liability Does Not Apply

On August 3, 2009, the State filed a Motion for Reconsideration (Dkt. #2392) of the Court's earlier Opinion and Order (Dkt. #2362) to the extent such Opinion and Order dismissed the State's CERCLA claims set forth in Counts 1 and 2 of the Second Amended Complaint. Because no ruling on the Motion for Reconsideration has been made as of the date of filing the present motion, out of an abundance of caution and a desire for judicial economy, the State offers the following analysis in the event the State's CERCLA claims in Counts 1 and 2 are reinstated.

Because CERCLA imposes joint and several liability on PRPs, evidence of other contributors of phosphorus to the IRW should be prohibited under Federal Rules of Evidence 401 and 402 for the purpose of implying or arguing that any or all Defendants are not jointly and severally liable under CERCLA.

Counts 1 and 2 of the Second Amended Complaint state claims for cost recovery and natural resource damages pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607. "CERCLA makes PRPs jointly and severally liable not only for all costs of removal and/or remedial action, but also for

'damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss. . . .'" *New Mexico v. General Elec. Co.*, 467 F.3d 1223, 1234 (10th Cir. 2006) (quoting 42 U.S.C. § 9607(a)(4)(C)); *United States v. Colorado & E. R.R. Co.*, 50 F.3d 1530, 1535 (10th Cir. 1995) (it is "well settled that § 107 imposes joint and several liability on PRPs regardless of fault"); *see also United States v. Capital Tax Corp.*, 545 F.3d 525, 534 (7th Cir. 2008) ("Once a party is found to be liable under CERCLA, the party is jointly and severally liable for all of the [plaintiff's] response costs, regardless of that party's relative fault." (internal quotation marks omitted)).

"Courts, however, do recognize one judicially created exception to joint and several liability under § 107(a). If a liable party can establish that the harm is divisible – that is, that there is a reasonable means of apportioning the harm among the responsible parties – then that party is not subject to joint and several liability. *See United States v. Township of Brighton*, 153 F.3d 307, 317-18 (6th Cir. 1998)." *Capital Tax*, 545 F.3d at 534-35. "CERCLA defendants seeking to avoid joint and several liability bear the burden of proving that a reasonable basis for apportionment [of harm] exists."[1] *Burlington N. & Santa Fe Rwy. Co.*, 129 S. Ct. 1870, 1881 (2009).

Under § 113(f) of CERCLA, a PRP who has incurred the entire cost of cleanup of a site may seek contribution from other PRPs. 42 U.S.C. § 9613(f); *City of Tulsa v. Tyson Foods, Inc.*, 258 F. Supp. 2d 1263, 1277 (N.D. Okla. 2003), *vacated in connection with settlement*. Only in such a

[1] In this regard, "[e]quitable considerations play no role in the apportionment analysis; rather, apportionment is proper only when the evidence supports the divisibility of the damages jointly caused by the PRPs. . . . [A]pportionment . . . looks to whether defendants may avoid joint and several liability by establishing a fixed amount of damage for which they are liable, while contribution actions [under 42 U.S.C. § 9613(f)(1)] allow jointly and severally liable PRPs to recover from each other on the basis of equitable considerations." *Burlington N.*, 129 S. Ct. at 1882 n.9; *see also Kalamazoo River Study Group v. Menasha Corp.*, 228 F.3d 648, 652-53 (6th Cir. 2000) (subject to the right of contribution contained in § 9613(f)(1), liability under § 9607(a) is generally joint and several regardless of fault). Thus, to avoid joint and several liability, Defendants could pursue a separate CERCLA § 113(f) contribution claim against other alleged contributors.

context would liability be allocated according to equitable factors. *Burlington N.*, 129 S. Ct. at 1882 n.9; *City of Tulsa*, 258 F. Supp. 2d at 1277. A § 113(f) contribution claim is not a part of this case.

Against this backdrop, given the absence of any evidence that Defendants can establish that the harm at issue is divisible, evidence of other contributors of phosphorus should not be permitted to support the argument or implication that the State's CERCLA claims do not impose joint and several liability on Defendants. *See United States v. Shell Oil Co.*, No. 91-0589, 1992 WL 144296, at *9 (C.D. Cal. 1992) (comparative fault and contributory negligence are not defenses to CERCLA liability); *United States v. Stringfellow*, 661 F. Supp. 1053, 1062 (C.D. Cal. 1987) (comparative fault and contributory negligence "are not relevant to the determination of the defendants' joint and several liability under section 107(a)"); *United States v. Fairchild Indus*, 766 F. Supp. 405, 410 (D. Md. 1991). Because liability under § 107 of CERCLA is strict, as well as joint and several, evidence of other contributors of phosphorus to the IRW simply is not relevant to the imposition of joint and several liability, and such evidence should be precluded for the purpose of implying or arguing that any or all Defendants are not jointly and severally liable.

Moreover, Defendants have no expert testimony to satisfy the burden they would bear to prove that a reasonable basis for divisibility of the harm exists. And finally, here, of course, there is no § 113(f) contribution claim and, therefore, § 113(f) provides no basis for the introduction of, or inquiry into, evidence of other contributors of phosphorus to the IRW.

In sum, evidence of other contributions of phosphorus to the IRW should be precluded for the purpose of implying or arguing that any or all Defendants are not jointly and severally liable under CERCLA.

B. Because the State Has Asserted Claims for Intentional Torts and Has Requested Injunctive Relief, Evidence of Other Contributors/Contributions of Phosphorus and Bacteria to the Watershed Should Be Excluded for the Purpose of Implying or Arguing That Any or All Defendants Are Not Jointly

and Severally Liable and/or That Their Conduct Should Not Be Enjoined

The State has asserted intentional torts in Counts IV (state law nuisance), V (federal common law nuisance), and VI (trespass) against Defendants and has requested injunctive relief as a part of all counts currently in the case (Counts III through VIII). Under Oklahoma law, if Defendants are found liable for an intentional tort, and/or if injunctive relief is granted, Defendants are jointly and severally liable. Accordingly, pursuant to Federal Rules of Evidence 401 and 402, Defendants should be precluded from presenting evidence of other contributors of phosphorus and bacteria to the IRW for the purposes of implying or arguing that any or all Defendants are not jointly and severally liable and/or that their conduct should not be enjoined on the basis of joint and several liability.[2]

1. Where the harm is indivisible and the tort is intentional, joint and several liability applies

Because joint and several liability applies to the State's intentional tort claims, Defendants cannot avail themselves of the defense of comparative or contributory negligence. Therefore, any testimony or other evidence relating to other contributions of phosphorus and bacteria to the IRW should be precluded under Federal Rules of Evidence 401 and 402 for the purpose of implying or arguing that any or all Defendants are not jointly and severally liable for injunctive relief.

The State's claims in Counts IV (state law nuisance), V (federal common law nuisance), and

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[2] In *City of Tulsa*, Judge Eagen stated that evidence of plaintiffs' contribution to the phosphorus could be relevant for the purpose of "defendants' proof of *want of causation*." *City of Tulsa*, 258 F. Supp. 2d at 1302. This exception to relevance does not apply here, where Defendants have no evidence to prove *want of causation.* There is no genuine dispute in this case that land-applied poultry waste is a cause of water pollution in the IRW. Defendants have recently admitted that "phosphorus is contributed to stream water during high-flow events from point **and non-point sources**." Dkt. #2199-2, ¶ 42 (emphasis added). The Cargill Defendants specifically admit that **"[p]oultry litter is one of multiple sources of phosphates in the watershed . . . ."** Dkt. #2200, ¶ 44 (emphasis added). Thus, Defendants cannot use evidence of other sources of contamination to prove want of causation.

VI (trespass) are all intentional torts. *See City of Tulsa*, 258 F. Supp. 2d at 1301 (trespass and nuisance are intentional tort theories). Accordingly, joint and several liability applies. *Id.* ("liability of each defendant for intentional torts is joint and several"); *see also Marshall v. Nelson Elec.*, 766 F. Supp. 1018, 1034 (N.D. Okla. 1991) (holding that the defendants in an action based on intentional infliction of emotional distress were jointly and severally liable); *Sevitski v. Pugliese*, 151 B.R. 590, 593 (N.D. Okla. 1993) (holding that defendants sued for fraud are jointly and severally liable). Moreover, courts have long held that defendants who pollute waterways are jointly and severally liable because the harm is indivisible. *See Prairie Oil & Gas Co. v. Laskey*, 46 P.2d 484, 485-86 (Okla. 1935); *Union Tex. Petroleum Corp. v. Jackson*, 909 P.2d 131, 150 (Okla. Civ. App. 1995).

As to intentional torts, the defense of comparative or contributory negligence does not apply. *See* Restatement (Second) of Torts § 840B(2) ("When the harm is intentional, or the result of recklessness, contributory negligence is not a defense."); *see also City of Tulsa*, 258 F. Supp. 2d at 1302; *Graham v. Keuchel*, 847 P.2d 342, 363 (Okla. 1993); Dkt. #2259, p. 8 ("Defendants agree that comparative negligence . . . does not apply to intentional torts.").

In sum, because liability under Counts IV, V, and VI is joint and several, evidence of other contributors of phosphorus and bacteria to the IRW simply should be precluded for the purpose of implying or arguing that any or all Defendants are not jointly and severally liable for injunctive relief.

2. Where injunctive relief is sought, joint and several liability applies

The State seeks injunctive relief in Counts III (Solid Waste Disposal Act), IV (state law nuisance), V (federal common law nuisance), VI (trespass), VII (27A Okla. Stat. § 2-6-105, 2 Okla. Stat. § 2-18.1), and VIII (2 Okla. Stat. § 10-9.7, Okla. Admin. Code § 35:17-5-5). Because a party facing the imposition of injunctive relief cannot avoid such liability based on other contributing

causes, testimony or evidence relating thereto proffered for the purpose of implying or arguing that any or all Defendants are not jointly and severally liable for injunctive relief is irrelevant and should be excluded under Federal Rules of Evidence 401 and 402

Where injunctive relief is sought, the defendant may not avoid liability on the basis that other contributing causes exist. *Siciliano v. Barbuto*, 164 N.E. 467, 469 (Mass. 1929); *Parker v. Am. Woolen Co.*, 81 N.E. 468, 471 (Mass. 1907); *Woods v. Khan*, 420 N.E.2d 1028, 1031 (Ill. App. Ct. 1981); *W. Arlington Imp. Co. v. Mount Hope Retreat*, 54 A. 982, 985-86 (Md. 1903).

Here, Defendants cannot, as a matter of law, assert a defense to the injunctive relief sought based on the existence of other sources of phosphorus and bacteria to the IRW, including any alleged contribution by the State itself. If the Court or jury finds a violation of RCRA, nuisance, trespass, or the statutory and administrative provisions, Defendants should be enjoined from continued land application and ordered to abate all of their activities that contribute the phosphorus and bacteria loadings to the IRW, regardless of what any other individual or entity may contribute thereto.

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WHEREFORE, premises considered, the State respectfully requests that the Court grant this Motion in Limine and enter an Order precluding Defendants, Defendants' witnesses and Defendants' counsel from directly or indirectly mentioning, inquiring about, introducing, arguing, or otherwise referencing any other contributions or contributors of phosphorus and bacteria to the IRW for the purpose of implying or arguing that any or all Defendants are not jointly and severally liable for damages, response costs and/or injunctive relief.

Respectfully Submitted,

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I hereby certify that on this 5th day of August, 2009, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

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